NORDIN YUSMADI YUSOFF

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CRIMINAL APPEAL NO: W-09-60-95]
18 JUNE 1997

CRIMINAL PROCEDURE: *Sentence - Juvenile offender - Rape - Section 376 Penal Code - Offender aged between 18 years and 21 years - Whether mandatory to impose custodial sentence - Whether Court could admit offender to Henry Gurney School - Section 40 Juvenile Courts Act 1947 - Whether could be applied - Whether irrelevant*

STATUTORY INTERPRETATION: *Section 40 Juvenile Courts Act 1947 - Whether comprising of two separate limbs - Scope and effect - Meaning of "any person" therein*

The appellant had pleaded guilty to a charge of statutory rape under s. 376 Penal Code and was accordingly convicted by the learned Sessions Judge. At the material time the appellant was aged 19 or 20 years. The learned Sessions Judge, having considered the circumstances, and the appellant's probation report, thought it undesirable that a custodial sentence as prescribed by the Penal Code be passed against the appellant, and in the event, invoked s. 40 of the Juvenile Courts Act 1947 ('the Act') and had the appellant admitted to the Henry Gurney School until he reaches the age of twenty-one years. On appeal, the High Court ruled, however, that s. 40 of the Act is irrelavant to the case, and the Sessions Judge was therefore wrong in opting to apply the section. The appellate Court also took the view that s. 376 of the Penal Code called for a mandatory custodial sentence, and in the circumstances, set aside the order of the Sessions Court and sentenced the appellant to 5 years imprisonment effective from the date of the appeal.

The appellant, who had served the detention order in full, appealed and the questions that arose were (i) whether the Sessions Judge was right and justified in invoking s. 40 of the Act; and (ii) whether the imposition of the custodial sentence by the appellate Judge contravened the Federal Constitution.

Held:
Per Shaik Daud Ismail JCA

[1] Section 40 of the Act confers special powers of the Juvenile Court to the High Court, a Sessions Court and a Court of a Magistrate of the First Class in respect of juveniles and persons of eighteen years and under twenty-one years. There are two limbs to this section.

[1a] The first limb provides that the section does not affect the powers of the High Court and all powers which may be exercised under the Act by a Juvenile Court in respect of a juvenile offender may in the like manner be exercised by the High Court. The word juvenile here must mean juvenile as defined by s. 2 of the Act ie, "a person who has attained the age of seven years and is under the age of eighteen". The second limb confers upon the High Court, a Sessions Court and a Court of a Magistrate of the First Class, powers to order detention, in a Henry Gurney School, up to but not after his attainment of the age of twenty-one years, of **any person** who has attained the age of eighteen years but not attained the age of twenty-one years at the time of the making of such order.

[2] It seems clear that the second limb of s. 40 is an additional power conferred on the High Court, a Sessions Court and a Court of the Magistrate of the First Class to order the detention of any person between the ages of eighteen years and twenty-one years, and is not confined to a juvenile as in the first limb. The appellant here was twenty years old when he was charged in the Sessions Court, and the second limb therefore squarely applies to him.

[3] Although a youth of above the age of eighteen can be sent to prison, in cases where the Court is of the view that it would be undesirable to send him to prison and to expose him to hardened criminals, it is open for the Court to act under the second limb of s. 40 of the Act, and order such youthful offender to be detained in a Henry Gurney School until he attained the age of twenty-one years, provided always that, at the time of the making of the order, he was between the ages of eighteen and twenty-one years.

[4] It would be wrong to say that, in view of the mandatory nature of s. 376 Penal Code, s. 40 of the Act is irrelevant. Section 40 of the Act is relevant and applicable even in cases where sentences of imprisonment is mandatory, provided the circumstances of the case justify it.

[5] The learned Sessions Judge was justified to exercise her discretion to act under s. 40 of the Act and the learned Judge, sitting in an appellate position, ought not to have interfered with the discretion.

[6] The facts in *Public Prosecutor v. Yap Huat Seng* are distinguishable. Unlike the present case, the respondent there committed rape on two very young sisters and used violence in the course of committing the rape. The offender there also robbed them of their meagre jewelleries at knife point, and consequently, was convicted of two charges of rape and two charges of armed robbery.

[7] The learned appellate Judge may have violated the second limb of Article 7 of the Federal Constitution. The appellant had, more or less, been imposed two sets of sentences from a conviction upon one charge, and had therefore "suffered a greater punishment for an offence than was prescribed by law".

[Appeal allowed, sentence set aside and appellant ordered to be released forthwith.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR JENAYAH: *Hukuman - Rogol - Seksyen 376 Kanun Keseksaan - Pesalah berumur antara 18 tahun dan 21 tahun - Samada mandatori untuk menjatuhkan hukuman penjara - Samada Mahkamah boleh memerintahkan pesalah ditahan di Sekolah Henry Gurney - Seksyen 40 Akta Mahkamah Juvana 1947 - Samada boleh digunapakai - Samada tidak relevan*

PENTAFSIRAN: *Seksyen 40 Akta Mahkamah Juvana 1947 - Samada mengandungi dua bahagian yang berasingan - Skop dan kesan - Maksud "sesiapa sahaja" di dalamnya*

Perayu membuat pengakuan bersalah terhadap satu tuduhan merogol di bawah s. 376 Kanun Keseksaan dan telah disabit dan dihukum dengan sekadarnya oleh Mahkamah Sesyen. Pada waktu yang material perayu berumur 19 atau 20 tahun. Hakim Sesyen yang bijaksana, setelah mengambilkira halkeadaan, dan laporan akhlak perayu, merasakan bahawa adalah tidak berkebajikan untuk menjatuhkan hukuman pemenjaraan seperti yang diperuntukkan oleh Kanun Keseksaan, dan oleh sebab itu, telah menggunapakai s. 40 Akta Mahkamah Juvana 1947 ('Akta') dan membuat perintah supaya perayu ditahan di Sekolah Henry Gurney sehingga beliau mencapai umur dua puluh satu tahun. Berikutan rayuan, Mahkamah Tinggi bagaimanapun memutuskan bahawa s. 40 Akta adalah tidak relevan kepada kes di sini, dan Hakim Sesyen dengan itu adalah silap apabila memilih untuk menggunapakai seksyen tersebut. Mahkamah rayuan juga mengambil pendapat bahawa s. 376 secara mandatori menetapkan

supaya hukuman pemenjaraan dijatuhkan, dan dalam halkeadaan tersebut, mengenepikan perintah Mahkamah Sesyen dan menjatuhkan hukuman 5 tahun penjara terhadap perayu bermula dari tarikh rayuan.

Perayu, yang telah menjalani perintah tahanan sepenuhnya, merayu dan persoalan yang berbangkit adalah (i) samada ianya betul dan wajar bagi Hakim Sesyen untuk menggunapakai s. 40 Akta; dan (ii) samada pengenaan hukuman pemenjaraan oleh Hakim rayuan bercanggah dengan Perlembagaan Persekutuan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Seksyen 40 Akta menganugerahkan kepada Mahkamah Tinggi, Mahkamah Sesyen dan Mahkamah Majisteret Kelas Pertama kuasa-kuasa khas Mahkamah Juvana berhubung juvana-juvana dan orang-orang yang berumur di antara lapan belas dan dua puluh satu tahun. Seksyen ini mengandungi dua bahagian.

[1a] Bahagian pertama memperuntukkan bahawa seksyen tersebut tidak mempengaruhi kuasa-kuasa Mahkamah Tinggi, dan semua kuasa-kuasa yang boleh dilaksanakan oleh Mahkamah Juvana di bawah Akta berhubung pesalah-pesalah juvana boleh dengan cara serupa dilaksanakan oleh Mahkamah Tinggi. Perkataan "juvana" di sini mestilah bermaksud juvana seperti yang ditafsirkan oleh s. 2 Akta, iaitu, "seseorang yang telah mencapai umur tujuh tahun tetapi masih di bawah lapan belas tahun". Bahagian kedua mengurniakan kepada Mahkamah Tinggi, Mahkamah Sesyen dan Mahkamah Majisteret Kelas Pertama, kuasa-kuasa untuk memerintahkan penahanan di Sekolah Henry Gurney, **sesiapa sahaja** yang telah mencapai umur lapan belas tahun tetapi belum mencapai umur dua puluh satu tahun sewaktu perintah tersebut dibuat, sehingga tetapi tidak selepas ia mencapai umur dua puluh satu tahun.

[2] Agak jelas bahawa bahagian kedua s. 40 adalah satu kuasa tambahan yang diberikan kepada Mahkamah Tinggi, Mahkamah Sesyen dan Mahkamah Majisteret Kelas Pertama untuk memerintahkan penahanan sesiapa sahaja yang berumur di antara lapan belas tahun dan dua puluh satu tahun, dan tidak terbatas kepada seorang juvana seperti dalam bahagian pertama. Perayu di sini berumur dua puluh tahun sewaktu beliau dituduh di Mahkamah Sesyen, dan bahagian kedua dengan itu semestinyalah terpakai kepadanya.

[3] Walaupun seorang belia yang berumur lebih dari lapan belas tahun boleh dihukum penjara, dalam kes-kes di mana Mahkamah berpendapat bahawa ianya tidak berkebajikan untuk berbuat demikian dan mendedahkannya

kepada samseng-samseng, ianya terbuka kepada Mahkamh untuk bertindak di bawah bahagian kedua s. 40 Akta, dan memerintahkan pesalah muda berkenaan ditahan di Sekolah Henry Gurney sehingga beliau mencapai umur dua puluh satu tahun, dengan syarat, sewaktu perintah tersebut dibuat, beliau berumur di antara lapan belas dan dua puluh satu tahun.

[4] Adalah silap untuk mengatakan bahawa, oleh kerana sifat mandatori s. 376 Kanun Keseksaan, maka s. 40 Akta adalah tak relevan. Seksyen 40 Akta adalah relevan dan terpakai walaupun dalam kes-kes di mana hukuman pemenjaraan adalah mandatori, jika halkeadaan kes mewajarkannya.

[5] Hakim Sesyen yang bijaksana telah bertindak wajar apabila melaksanakan budibicaranya untuk menggunapakai s. 40 Akta dan Hakim rayuan yang bijaksana tidak seharusnya mengganggu keputusan tersebut.

[6] Fakta-fakta dalam *Public Prosecutor v. Yap Hut Seng* adalah berbeza. Tidak seperti kes ini, responden dalam kes tersebut telah melakukan rogol terhadap dua gadis adik beradik yang masih sangat muda dan menggunakan keganasan dalam melakukan perbuatan tersebut. Pesalah dalam kes itu juga telah merompak barang kemas mereka yang tidak seberapanya itu dengan menggunakan pisau, dan akibatnya, telah disabitkan dengan dua kesalahan rogol dan dua kesalahan rompakan bersenjata.

[7] Hakim rayuan yang bijaksana mungkin telah melanggar bahagian kedua Fasal 7 Perlembagaan Persekutuan. Perayu boleh dikatakan telah dihukum dengan dua bentuk hukuman atas satu sabitan terhadap satu tuduhan, dan dengan itu telah "suffered a greater punishment for an offence than was prescribed by law"

[Rayuan dibenarkan, hukuman diketepikan dan perayu diperintah dibebaskan serta merta.]

Case referred to:
PP v. Yap Hut Seng [1985] 2 MLJ 143 ***(dist)***

Legislation referred to:
Criminal Procedure Code, ss. 173, 294
Federal Constitution, art. 7
Juvenile Courts Act 1947, ss. 2, 40
Penal Code, s. 376

[Appeal from High Court Malaya, Kuala Lumpur; Criminal Trial No: 42-11-1994]

For the appellant - Gregory Chan (Richard Ho with him); M/s Richard Ho & Co
For the respondent - Zaitun Zawiyah Puteh, DPP

JUDGMENT

Shaik Daud Ismail JCA:

The appellant was convicted on 24 February 1994 by the Sessions Court Kuala Lumpur of a statutory rape of an underage girl, who was then 15 years 11 months, an offence under s. 376 of the Penal Code. The appellant was then 19 years old, a first offender and he had pleaded guilty to the charge. In view of his age the learned Sessions Court Judge called for a probation report on the appellant and after considering the report and the facts of the case, she ordered the appellant to be detained in the Henry Gurney School until he reaches the age of 21 years. Although the learned Sessions Judge did not specifically set out under which provisions of the law she acted, she presumably did so under s. 40 of the Juvenile Courts Act 1947, (hereinafter referred to as 'the Act'). Appellant was accordingly sent to the Henry Gurney School and he served his detention there until he reached 21 years of age and was released on 16 January 1995. In the meantime the Public Prosecutor being dissatisfied with the sentence imposed by the Sessions Court filed a notice of appeal to the High Court on 3 March 1994. Unfortunately the appeal was never heard promptly as it should have been, but was heard on 27 November 1995, by which date the appellant had been released from the Henry Gurney School.

The learned Judge allowed the appeal, set aside the order of the Sessions Court, and imposed the minimum term of imprisonment of 5 years as provided by s. 376 of the Penal Code, which term was to commence from the date of the order that is 27 November 1995. The learned Judge was of the view that pursuant to the mandatory provision of s. 376 of the Penal Code, the Sessions Court was wrong in law to impose any other sentence, and that s. 40 of the Act has no relevance.

The learned Sessions Judge took into consideration the facts of the case, the probation report on the appellant, the fact that he pleaded guilty and was a first offender and also the serious nature of the offence and she concluded in her grounds of judgment as follows:

> Walaupun apa yang telah dilakukan oleh Tertuduh adalah sesuatu yang serius yang tidak sepatutnya dimaafkan Mahkamah berpendapat hukuman minima jika disabitkan dengan kesalahan merogol iaitu 5 tahun penjara adalah berat bagi Tertuduh. Tertuduh dalam usianya yang muda seharusnya diberi peluang untuk memperbaiki dirinya. Dengan menghantarkannya ke penjara dalam usia yang begitu muda tidak akan mendatangkan apa-apa kebaikan kepada Tertuduh malahan akan mendatangkan kemudaratan kepadanya.

In view of what she had said above, the learned Sessions Judge while appreciating the serious nature of the offence was of the view that in the circumstances of the case, it would be more appropriate to have the appellant detained in the Henry Gurney School until he reaches the age of 21 years.

The issue before this appeal is whether s. 40 of the Act is applicable in cases of this nature. This section confers special powers of the Juvenile Court on the High Court, a Sessions Court and a Court of a Magistrate of the First Class in respect of juveniles and persons of eighteen years and under twenty-one years. It provides that:

> Nothing in this Act other than ss. 15 and 16 shall affect the powers of the High Court and all the powers which may be exercised under this Act by a Juvenile Court in respect of a juvenile offender may in like manner be exercised by the High Court; and, in addition, the High Court, a Sessions Court and a Court of Magistrate of the First Class shall have power to order the detention, in a Henry Gurney School, up to but not after his attainment of the age of twenty-one years, of any person who has attained the age of eighteen years but has not attained the age of twenty-one years at the date of making such order.

On our reading of this section we find that there are two limbs to it. The first limb provides that the section does not affect the powers of the High Court and all powers which may be exercised under the Act by a Juvenile Court in respect of a juvenile offender may in the like manner be exercised by the High Court. The word juvenile here must mean juvenile as defined in s. 2 of the Act to mean, "a person who has attained the age of seven years and is under the age of eighteen. The second limb of the section confers upon the High Court, a Sessions Court and a Court of a Magistrate of the First Class powers to order detention, in a Henry Gurney School, up to but not after his attainment of the age of twenty-one years, of **any person** who has attained the age of eighteen years but has not attained the age of twenty-one years at the date of making such order. It seems clear to us that the second limb is an additional power under the section conferred on the High Court, a Sessions Court and a Court of the Magistrate of the First Class to order the detention of any person, not confined to a juvenile as in the first limb. Therefore, on a proper reading of the second limb of s. 40 of the Act, we are of the view that it relates to any person as long as he is above eighteen years and under twenty-one years at the date of the making of such order. Taking into consideration the facts of the present case on appeal, and since the appellant was twenty years old when he was charged in the Sessions Court, we are of the view that the second limb of s. 40 of the Act squarely applies to him. We are of the view that although a youth of above the age of eighteen can be sent to prison but in cases where the Court is of the view, after

considering all relevant factors pertaining to that particular case, that it would be undesirable to send him to prison and to expose him to hardened criminals, a Sessions Court or a Magistrate of the First Class, is conferred with the special and additional powers to act under the second limb of s. 40 of the Act, and order such youthful offenders to be detained in a Henry Gurney School until he attained the age of twenty-one years, provided that at the time of the making of the order, he was between the ages of eighteen years and below twenty-one years. We are, therefore, of the view that, in the circumstances of this case, it was proper for the learned Sessions Judge to act under the second limb of s. 40 of the Act. She came to this conclusion after considering every aspect of the case. In our view, it would be wrong to say that, in view of the mandatory nature of s. 376 Penal Code, s. 40 of the Act is irrelevant. We hold that s. 40 of the Act is relevant and applicable even in cases where sentences of imprisonment is mandatory, provided the circumstances of the case justifies it. When imposing the five years sentence, the learned Judge cited the case of *PP v. Yap Hut Seng* [1985] 2 MLJ 143, also case of rape committed by a young offender. In that case I had the occasion, as a High Court Judge, to say that in specific cases the Courts should not place too much emphasis on the fact that the offender was young and a first timer but public interest demands that in such cases a deterrent sentence be imposed. The facts of that case are distinguishable. There the respondent committed rape on two very young sisters and in the course of committing the rape, violence was used and he also robbed them of their meagre jewelleries at knife point. He was convicted on two charges of rape and two charges of armed robbery. The facts of the present case are far different.

There are elements of consent by the complainant, although this is not relevant in view of her age. The facts also showed that she did not report the incident to anyone until her father threatened her. A medical examination of the complainant on the same day revealed that she was suffering from a venereal disease which further suggest that she must have indulged in sexual activities before this particular incident. Having considered all these, the learned Sessions Judge rightly came to the conclusion that it would be appropriate and in her best interest to order the appellant to be detained under the second limb of s. 40 of the Act.

The learned Senior Federal Counsel appearing for the respondent while conceding that s. 40 of the Act is applicable to convictions under s. 376 of the Penal Code, just as the provisions of s. 173 and 294 of the Criminal Procedure Code, questions whether the facts of the present case justifies the learned Sessions Judge to act under s. 40 of the Act. We are of the view that after considering the facts of this case, we agree that the learned Sessions Judge was justified to exercise her discretion to act under s. 40 of the Act and we feel that this discretion ought not to be disturbed.

Before leaving this matter, we would like to touch on one other aspect of this case. As we stated earlier, when the learned Judge imposed the five years imprisonment the appellant had been released from the Henry Gurney School and was in fact a free person for a period of ten months. He had, therefore, served the order imposed by the Sessions Judge. In our view, when the learned Judge imposed a sentence of imprisonment of five years from the date of the appeal, he may have violated the second limb of art. 7 of the Federal Constitution.

Article 7 provides that:

> (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, **and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed**.

In imposing the five years imprisonment to take effect from 27 November 1995 after the appellant had served the order of detention, the appellant had, more or less, been imposed two sets of sentences from a conviction upon one charge, and the appellant had, therefore, "suffered a greater punishment for an offence than was prescribed by law." Although the learned Judge said that he took into consideration the time spent in the Henry Gurney School, this to our mind, is not reflected in the sentence which took effect from the date of the appeal.

For the above reasons, we are of the view that, in the circumstances of this case, the learned Judge sitting in an appellate position ought not to have interfered with the discretion of the learned Session Judge. We allowed the appeal, set aside the sentence of five years imprisonment, and ordered the appellant to be released forthwith.

Reported by WA Sharif